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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

Nos. 281-282

In the Matter of

GRANADA APARTMENTS, INC.,

Debtor.

WEIGHTSTILL WOODS, COURT TRUSTEE,

Petitioner,

vs.

CITY NATIONAL BANK AND TRUST CO. OF CHICAGO, AND OTHERS,

Respondents.

REPLY BRIEF FOR PETITIONER.

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Respondents.

To the Honorable Justices of the Supreme Court of the United States:

Petitioner respectfully makes reply as follows:

I.

In Reply to Respondents' "Statement of the Case".

Respondents' "Statement of the Case"[1] is a 20 page attempt to organize in confusion the essential facts of the case. It is a clever presentation of assertions which could not be made in any other part of the brief. By calling it a "chronological record statement"[2] Respondents

1. Pages 1-22 of Respondents' Brief.
2. Page 1 of Respondents' Brief.

attempt to justify narrative presentation of disconnected subject matter. Respondents have attempted to make a simple case again complex;[3] to disarrange some facts, to misstate others, and intersperse mere assertions to confuse the evidence pertaining to all admitted findings.

Respondents' "Statement of the Case" (1) *argues* about the trial court's findings of fact, although said findings stand admitted by Respondents' failure to assign error, and (2) makes untrue statements in the form of mere conclusions and explanations by counsel, which are outside of the record and are not supported by any record references.

Examples of the technique involved in this "Statement of the Case" will suffice to prove its real nature.

(1) *The 1924 prospectus.* At page 3 of their brief Respondents say that the 1924 prospectus did not state that the furniture was a part of the security for the bond issue. They refer to page 334 of the printed record. Examination of that document and its photo illustrations refutes above statement by counsel for Respondents. The furniture is described in glowing terms, and also is illustrated by pictures. The trial court's finding that the 1924 prospectus does pledge the furniture as security for the bondholders,[4] was not assigned as error[5] by Respondents but was thus admitted by solemn record.

(2) *The 1928 prospectus and the Respondent Attorneys' knowledge thereof.* At page 5, paragraph 2 of their brief, Respondents in regard to the 1928 Chicago Trust Company prospectus say:

"* * * the fact is that the attorney respondents did

3. PR. 986-987, "Petition for Rehearing."
4. PR. 774, Finding 16.
5. See page 98 of Petitioner's original brief at paragraph 16.

not learn of the contents of the circular until it was produced at the trial * * *."

This statement is a mere assertion without record reference. The assertion is untrue. One of the respondent attorneys testified at the trial, that his firm was the general counsel for the Chicago Trust Company,[6] that his firm had handled the out of court Granada reorganization in 1929, and had assembled a "Green Book" of documents at that time. Respondents ask your Honors to believe that this client issued a prospectus on bond issues involving $885,000[7] without having even shown the prospectus to its general counsel. Whether or not Mr. O'Brien knew, other members of his firm had the duty to know.

(3) *Knowledge of the Wenstrand, Riddle and Cody Indemnity Agreement.* At page 10 of their brief respondents' attorneys state that they did not know of the indemnity agreement until it was disclosed in the Granada trial in 1937. The duties undertaken by Respondents charged them with the duty to make full inquiry and to know about the primary liability of Wenstrand and others. Wenstrand filed the injunction suit[8] and appealed it. A bond was known to be necessary. It was part of the record. As party plaintiff Wenstrand was primarily liable on that bond. None of the Granada corporations were parties to the suit. Despite this, Respondents admit that when suggestions of damages were filed against Wenstrand and his surety[9] by Albert Pick & Company, they made it an express condition of the settlement with the Pick Company that Wenstrand's surety would be saved harmless by Pick's

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6. PR. 496, 497.

7. The 1928 refinancing consisted of a new first mortgage bond issue of $525,000 and a new second mortgage bond issue of $360,000 —statement at page 3 of respondents' brief.

8. *Wenstrand* v. *Pick & Co.*, See Appendix "A," Petitioner's original brief.

9. Indemnity Insurance Company of North America, see pages 9-10 of respondents' brief.

dismissing its suggestion of damages.[10] Respondent attorneys filed answers for Wenstrand, and the surety company in the suggestion of damage proceedings. They had access then to all files in 1930. The underlying and essential liability thus avoided was Wenstrand's, Riddle's and Cody's. Granada funds in the amount of $22,500[11] were paid to Pick & Company to pay off this liability of these men. The subsequent indemnity agreement in relation to the Receiver's Certificate merely left these men in the same position with Indemnity Insurance Company of North America as they were on the original injunction bond. The Receiver's Certificate was mere legal embroidery of a status of principal and surety which had been long before assumed. Respondents' counsel knew of the original indemnity arrangement which was never changed. Your Honors have stated the inescapable duty of a fiduciary to exercise constant alertness, in your opinion in *United States, ex rel. Willoughby* v. *Howard,* 302 U. S. 445.

(4) *Who hired respondent attorneys?* Respondents' statement at page 12 relating to witness Johnson's testimony that the committee did not hire Defrees, Buckingham, Jones & Hoffman, is without foundation. Johnson was not talking about 1930, 1931 or 1932. He was then at other employment. He was speaking of 1935 and 1936—two and three years after the committee had been formed. He spoke of the relation of the committee and its lawyers as it existed when the *Tuttle* v. *Harris* litigation was pending. Witness Johnson said:[12]

> "The Central Republic Bank and Trust Company employed the attorneys in the case of Harris against Tuttle,[13] which went to the Supreme Court. The committee had nothing to do with hiring those lawyers."

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10. Page 9 of Respondents' brief.
11. Page 8 of Respondents' brief.
12. PR. 436.
13. *Tuttle* v. *Harris,* No. 59143, U. S. District Court, March, 1935. *Tuttle* v. *Harris,* No. 5488 in Circuit Court of Appeals, 1935. *Tuttle* v. *Harris,* U. S. Supreme Court, 297 U. S. 225 (1936).

The case was in the name of the committee, but it had nothing to say about the employment of Defrees, Buckingham, Jones & Hoffman as its counsel. Mr. Tuttle was chairman of the committee.[14] Witness Johnson was not referring to the Thuma-Granada fixture litigation. The Thuma litigation began in June, 1930. That was before Johnson knew about Granada. (PR. 430.) He was testifying from his own knowledge about the retention of counsel in 1933 and subsequent thereto.

(5) *Mateer, Cody Trust, Albers, Barton and Gehm.* The statement in the first paragraph at page 13 of Respondents' brief covers a wide range of assertion outside of the present record. They are recited without citation of any record references.

(6) *Opposition by the Indenture Trustee to the federal reorganization proceedings.* In the last paragraph at page 17, it is stated that City National and the Committee did not oppose "the approval of the petitions in the present 77B proceedings." This is contrary to the admitted facts. The trial court found[15] that "In present reorganization case, City National and said attorneys filed in writing objection and motion to dismiss on May 17, 1937, in an effort to thwart and stay all action by this court." This finding was admitted and was never assigned as error.[16] In preparing this case for the Court of Appeals, counsel for respondents omitted from the printed record, much of the evidence pertaining to all admitted findings.

(7) *Objections were made in writing by the Court Trustee.* At page 19, paragraph 4 of their brief, Respondents state that the claims of the committee and of the counsel, Defrees, Buckingham, Jones & Hoffman, were never objected to by the Court Trustee. We submit that such asser-

14. PR. 318.

15. PR. 786, Finding 46.

16. See Appendix "D", p. 101, par. 46 of Petitioner's original brief.

tion is not the truth. At page 84 of the printed record there appears "objections by the Court Trustee to claims filed before the Special Master." And at pages 127 to 139 of the printed record, there appears the "Suggestions (objections) by Federal Court Trustee, to surcharge and falsify accounts and *to deny all claims by City National Bank and Trust Company, its Committee and their counsel;* and petition by Federal Trustee for general relief against Respondents herein named." We submit that a reading of these objections and suggestions, shows that they constitute objections of the most exact kind, to all claims by the Committee and Counsel and City National as trustee.

(8) *The Decree and Findings of Fact as submitted by the Court Trustee.* At page 21 of their brief Respondents state that the trial court entered the decree and findings of fact in "substantially the same form as had been presented by the Court Trustee." We submit that this statement is untrue. The court held the submitted findings and decree under advisement for several months to consider and revise them. The court made many changes. It eliminated whole paragraphs and many sentences from the findings that were first suggested to the court for revision. The settlement of the findings by the court, was more complete and thorough than is usual procedure in settling findings for record.

(9) *Respondents' failure to assign error.* At page 21, paragraph 1, under heading "Proceeding in Circuit Court of Appeals", respondents' brief states:

> "Respondents appealed from the decree and from all materially adverse findings."

We submit that this in untrue. At Appendix "D", pages 97-102 of his original brief, this petitioner has recited paragraph by paragraph these findings of the trial court which were fully admitted by respondents' failure to assign error. That many of these findings are materially adverse to respondents, is, we submit, shown by their own language. The

accuracy and correctness of the contents of Appendix "D" to our opening brief has not been questioned. That appendix is based upon the respondents' assignment of error[17]

(10) *Respondents' failure to argue findings which they assigned as error.* At the last paragraph of page 21 of their brief, respondents state they argued all of such findings and that Appendix "D"[18] of petitioner's brief does not deal with findings to which error *was* assigned. We submit that both statements are untrue. Both by parenthesized statement in its body, and by footnote, Appendix "D" gives those findings which were assigned as error, but which were not argued by Respondents. It appears from Appendix "D" that some seven important findings or portions of findings were assigned as error, but were never argued by Respondents in the Circuit Court of Appeals.

The "Statement of the Case"[19] by the Petitioner in his opening brief, presents all of the information essential to consideration of the case. Petitioner affirms that all of the matters therein stated are true in substance and in fact. The "Statement of the Case" as presented in Respondents' brief details many inconsequential matters not in issue in any court. Such matters as the $90,000,000 loan which General Charles G. Dawes negotiated for either his Central Republic Bank & Trust Company, or his City National Bank and Trust Company from the R. F. C.[20] have no value to sustain Respondents, so far as the case at bar is concerned. The recitation of such matters is merely for the purpose of making simple facts seem complex and difficult. Petitioner charges that the desire for complexity is the reason for such "Statement of the Case" as is made by Respondents at bar. Not only is much of the matter

17. PR. 817-832.
18. Pages 97-102.
19. Pages 3 to 12 of original brief.
20. Page 8 of Respondents' Brief.

thus mentioned by Respondents of no consequence; but, as above shown, that part of it which is of consequence, is misstated to the point of being untruthful.

Misconduct by Respondents in This Litigation.

The District Court gave an opinion to disallow the claims now at bar by Respondents, on July 14, 1938. The next day the Respondents appeared and objected to any allowance of fees on account to the Court Trustee. They appealed from the order then made. The Circuit Court of Appeals ruled that the Respondents had no right to appeal and no interest in the matter of allowances to the Court Trustee. (104 F. 2d 970.) Respondents sought a writ of certiorari from this court, which was denied (No. 469, 308 U. S. 607). The lack of interest was thus made law of the case and *res judicata*. Regardless of that final action by the Court of Appeals and by this court, the Respondents seek to renew their assertions about the Court Trustee and his compensation, even in this case where such matters are not pertinent to any issue in this record. (See peroration of brief for Respondents at pages 75-76.) This conduct by Respondents is contrary to all rules and principles for brief writing and presentation of this case. We submit that Respondents have committed a mild contempt of this court by so doing.

II.

The Respondents Did Not Faithfully Discharge Their Duties as Fiduciaries and They Are Not Entitled to Compensation.

(a) *The entire case was presented to the Circuit Court of Appeals by this Petitioner.*

Respondents do not state which of the contentions now being raised by Petitioner, were not raised in

the courts below. Their statement [21] does not specify which matters they assert are new. Their statement could not so specify, because the fact is that the contentions now being urged by Petitioner, are the ones which have always been urged, and arise as matter of law to support and apply the findings of fact made by the trial court.[22] These findings of fact were before the Circuit Court of Appeals. That court reversed them. All of the issues of law now presented have always been presented. The emphasis has varied to meet what Respondents had to say.

The brief which *Respondents* filed in the Circuit Court of Appeals, made a personal attack upon the trial judge, but admitted that much of the evidence was conflicting, and asserted that the findings should be reversed, even if based upon substantial evidence, because the trial judge (Respondents said) was prejudiced.[23] Thus the issue *asserted by Respondents* in the Circuit Court of Appeals, was whether or not the trial judge was prejudiced in his attitude and determination of the case. Respondents by their brief then admitted that the evidence was conflicting, and therefore that the findings would not be reversed, in the absence of a determination that the trial court was prejudiced and unfair. Consequently this Petitioner's first point in his answering brief in the Circuit Court of Appeals,

21. Pages 26-28 of Respondents' brief.

22. PR. 769-793.

23. Respondents' Brief in the Circuit Court of Appeals had for Point I the following heading: "FROM THE OUTSET THE TRIAL COURT MANIFESTED, AND CONSISTENTLY MAINTAINED AN ATTITUDE HOSTILE, ADVERSE, AND PREJUDICIAL TO THE INDENTURE TRUSTEE, THE COMMITTEE, AND THEIR COUNSEL, WHICH CULMINATED AS IT SEEMS TO US, IN FINDINGS AND A DECREE WHOLLY UNWARRANTED BY THE FACTS OF RECORD AND THE LAW APPLICABLE THERETO" and at page 28 of the argument their brief stated that "in those instances in which there was conflicting evidence, the findings, if against the weight of the evidence, should not stand *if it also appears that the court was prejudiced and prejudged the case.*" Also see at PR. 982.

was that the District Judge was fair and impartial in the trial of the cause and that Respondents' statements to the contrary were without foundation. [24] Although the Respondents were unsuccessful in their effort to impeach the integrity of the District Court, and despite the fact they had admitted that the evidence was conflicting, yet the Circuit Court of Appeals reversed the trial court. It is noteworthy that the Respondents in their present briefs do not attack the fair mindedness of the District Court. It shows that there was no substance in that contention once made but now abandoned by the Respondents.

Under these circumstances, and since many of the findings of the trial court had not been assigned as error and thus stood admitted,[25] this Petitioner stood upon the trial court's findings, and saw no need to make extensive citations of record references of evidence, in his brief in the Circuit Court of Appeals. Despite this however, he did make such record references as he deemed necessary for a proper presentation of this case. Portions of the testimony of Messrs. Sturm, Hall and Clarke with suitable record references were printed at pages 77-78 of his brief. Some of the testimony of Mr. O'Brien was printed at pages 42-43 of the brief. After the opinion of the Circuit Court of Appeals had stated that insufficient record references had been made, the Court Trustee made appropriate motion[26] and asked leave to file "a printed summary of substantial evidence from the original transcript of record arranged

24. At page 42 of this Petitioner's brief in the Circuit Court of Appeals, his Point I was stated as follows: THE CONDUCT OF THE TRIAL BY THE DISTRICT JUDGE WAS PATIENT AND FAIR TO ALL APPELLANTS. THE REMARKS BY APPELLANTS IN THEIR BRIEF ABOUT THE DISTRICT JUDGE, ARE NOT FAIR NOR REASONABLE. SAID REMARKS ARE AN AFTERTHOUGHT LACKING ANY HONEST PURPOSE OR FOUNDATION IN THE RECORD.

25. See Appendix "D", pages 97-102 of Petitioner's brief in this court for Findings of Fact to which error was not assigned.

26. Motion of April 18, 1940, PR. 991-995.

under and in support of the findings of fact made by the District Court."

In his suggestions in support of the motion, the Court Trustee said:[27]

> "However, the Court Trustee does not stand on ceremony. Without lessening his emphasis on legal principles that are applicable, and not withdrawing from his position, the Court Trustee is willing to go through this original transcript of record and prepare a detailed arrangement of the factual material in relation to each one of the findings of fact made by the District Court. As an officer of the court he wishes to assist by any means the court desires. He asks permission to prepare from the transcript a printed summary of substantial evidence. * * *"

This motion was denied.[28] What more could the Court Trustee do? The breach of fiduciary obligations and duties had been fully presented to the court in the briefs, the petition for rehearing[29] and the offer to annotate by additional evidence had been rejected. But whether or not the Court Trustee did emphasize the evidence of the case in the best possible way in the Circuit Court of Appeals, yet those findings of fact of the District Court which had not been assigned as error, were before the Circuit Court of Appeals. They standing alone, spoke for themselves conclusively, upon the question of the breaches of trust by respondent fee claimants.[30]

(b) *The Granada Bondholders had the right to expect that a Committee which presumed to represent them, would consist of independent persons exercising independent discretion in their behalf, and would not consist merely of pawns of other unfaithful fiduciaries and refuse to prosecute on behalf of the bondholders, these other unfaithful fiduciaries who dominated them.*

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27. PR. 992.

28. PR. 999.

29. PR. 973-990.

30. Also, Section 250 of the Chandler act provides that fee appeals shall be heard upon "the original papers."

Chart Number One at page 64 of Petitioner's opening brief, shows the domination over the committee by (1) City National Bank (2) by Cody Trust Company and officers (3) by Lewis Riddle (4) by the Arlington Hotel and (5) by the Chicago Trust Company. This chart also shows the overt acts committed by the committee in furtherance of the designs of these dominating groups. This chart fully answers the questions proposed by respondents at page 30 of their brief.

Although Respondents' title at page 29 of their brief indicates that they will defend the presence upon the committee of employees of Cody Trust Company, yet the discussion that follows does not mention the Cody Trust Company nor their employee-committee members.

So far as the committee is concerned, the gist of the apology for acts of Respondents in breach of trust, is that if a full disclosure had been made to the bondholders, that then the bondholders might have assented, and *then* the things done *might* have been permissible. But *such a disclosure was never made by Respondents to the bondholders.* The relationship of the committee members to the Cody Trust Company, to the City National, and to other adverse interests, was not disclosed to the bondholders. Respondents do not contend otherwise in their brief. The silence of the brief for Respondents on this matter speaks eloquently.

Cases Cited by Respondents.

The trial court in the case of *Cromwell* v. *Curtis,* 99 F. (2d) 810 (which is cited without discussion at page 23 of Respondents' brief), did the exact opposite of the trial court in the case at bar. The Court of Appeals indicated (p. 812) that the trial court allowed fees because it knew about all of the transactions, and thought that the attorneys were "above-board" about it. Respondents have

stated no reasons why their non-disclosure should entitle them to the same consideration.

The case of *In re Milwaukee Lodge No.* 46, *B. P. O. E.*, 83 F. (2d) 662 (C. C. A. 7) is the *first* case cited in the chart at Appendix "A" of petitioner's reply (filed herein on September 28, 1940) to respondents' answer to the petition for certiorari, wherein fees for professional reorganizers have been increased by the Seventh Circuit Court of Appeals. Petitioner could distinguish it (a 77B instead of a Chandler Act case), from the case at bar. But petitioner prefers to state that the decision is wrong and would promote a dangerous policy, contributing to the general breakdown of the trust relationship. Petitioner challenges that opinion as a departure from the law which governs reorganization proceedings.

In the case of *Kuhn, Loeb & Co.* v. *Paramount Publix Corporation*, 83 F. (2d) 406, cited by Respondents at page 23 of their brief, the opinion by Judge Manton recites that the trial judge made findings of fact that the work of the fee claimants had been noteworthy and substantial, and that they were "entitled to substantial recognition." The Court of Appeals ruled that if this were so, that then under Section 77B (c) (9), 11 U. S. C. A., Section 207 (c) (9), compensation could be allowed. There was no suggestion of any breach of trust nor of any adverse relationship. If similar findings had been made by the trial court in the case at bar, suggested by appropriate evidence, then perhaps Respondents would be entitled to fees and expense allowances. The situation of the Respondents however, is more akin to that of the banker's bondholder's committee in the 1925-1928 receivership and reorganization of the Chicago, Milwaukee and St. Paul Railway Company. A committee of the United States Senate has been investigating this transaction and has found that

> "* * * the committees abdicated to the bankers any power they might thereafter acquire, although

nominally they maintained their positions, and appeared as the owners of the property during reorganization."[31]

The Senate Committee also found (p. 12) that:

> "This window dressing function of the committees, for which, incidentally, they were handsomely paid by the reorganization managers, out of the security holders' money was an open secret to the Wall Street Financial Community."

To which it may be added that La Salle Street, Chicago, is equally well informed.

At pages 23-24 in their "Points and Authorities" Respondents list a group of cases. The argument contains no discussion of any of the cases there cited. A reading of their first case, *French* v. *Hall;* 84 N. E. 438 (Mass. 1908) shows that a disclosure of the transaction was made to the *cestui.* At page 440 the court says:

> "The last three of these accounts were assented to by the *cestui que trust,* but none of them was filed in the probate Court."

In the case at bar there was no disclosure. Respondents do not contend that there was. They avoid a discussion of their failure to perform that primary duty.

The case of *Springfield Safe Deposit & Trust Company* v. *First Unitarian Society,* 200 N. E. 541 (Mass.), cited by Respondents at page 23 of their brief, does not involve the proposition now under discussion. It does not seem from a reading of the case that the question of a dual trustee selling one trust's property to another trust, ever arose or was discussed by the court. It is difficult to determine why Respondents cited this case. It is not relevant to the issue under discussion.

Lima First American Co. v. *Graham,* 6 N. E. (2d) 33, cited at page 24 of Respondents' brief, is a case decided

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31. Page 11, Report 25, Part 18, Additional Report of the Committee on Interstate Commerce, "Chicago, Milwaukee and St. Paul Railway Company 1925-1928 Receivership and Reorganization." November 15, 1940, United States Government Printing Office.

by an Ohio Appellate Court. It is a unique decision. Although the opinion is 13 pages long in the official reports (54 Ohio App. 85), not a single authority, text or case, is cited by the court in support of the conclusions reached. It is at best, a questionable decision by an intermediate Appellate Court.

In *Roberts* v. *Michigan Trust Co.*, 262 N. W. 744 (1935), cited by Respondents at page 24 of their brief, the trustee was held liable for selling to one trust, a bond from another estate of which it was also trustee. The reason for this holding was the failure of the trustee to *disclose* to its *cestui* the nature of its dual trusteeship. The court said (p. 754):

> "The purchase of this bond was improper; the adjudication[32] on that item was not conclusive; the purchase of the bond at a profit to another estate of which the trust company was trustee should have appeared on the account or been called to the attention of interested parties."

The finding at bar by the trial court[34] relating to Respondents' failure to disclose to the Granada Bondholders and Creditors the adversity of their relationship is printed at page 34 of petitioner's original brief. Respondents' brief does not contend that the facts, as there found, relating to the absence of such disclosure are untrue. Respondents do not suggest that such a disclosure was ever made, nor that any *consent* to continue such adverse representation was ever obtained.

Likewise Respondents do not attempt to defend their breach of trust in the cancelling by them of a Granada account receivable of $4,080 due and owing from the Arlington Hotel. (See pages 35, 36, 39, 40, 44 and Chart Two, Item 1, overt acts committed at pages 65-66 of Petitioner's original brief.)

In Re Kramer's Estate, 15 N. Y. S. (2d) 700, at p. 702, it

32. The approval of the final account in the Probate Court.

34. Finding 50 at PR. 788.

appears that the will of the decedent provided that investments should be made "without either of my said Executors or Trustees being liable for such acts." The case can be fully explained upon this single point. That court said (p. 703):

> "It is of importance here that the clause contains not only dispensation from liability, but also the widest grant of power and discretion to invest in securities other than those within the class of legal investments."

The law on the subject is codified at Section 6 of the *Uniform Trusts Act*, which provides that:

> "No trustee shall as trustee of one trust sell property to itself as trustee of another trust." [33]

(c) *As trustee of Granada it was the duty of City National to obtain from Arlington the highest possible price for the rendition of heat, refrigeration and water services.*

This rule is a familiar one to all fiduciaries. If such showing had been made, it is not enough to say that the fiduciary got a "fair price" for the sale of trust property. It is necessary to prove also that (1) there was no breach of trust by reason of the trustee's representing the purchaser or other parties who had an adverse interest, and (2) that the price obtained was not only a fair price, but was also the *highest possible price* which could have been obtained. No such showing was attempted to be made by the respondents at bar.

The case of *Jackson, Receiver,* v. *Smith,* 254 U. S. 586 (1920), presents the rule. At page 588 Justice Brandeis, speaking for the court, said:

> "Ambrose had, as receiver, the affirmative duty to endeavor to realize the largest possible amount from the Schwab note * * *. To this end it was his duty

33. This aspect of the situation is recognized by Federal Reserve Board Regulation F (1937) S. 11 (c), which provides:

> "A national bank acting as fiduciary shall not make any advance to any trust from the funds belonging to any other trust, except when making of such advances to a designated trust is specifically authorized by the trust instrument covering the trust from which such advances are made."

> to endeavor to have the land, when sold under the trust deed, bring the largest possible price."

In the case at bar City National, as trustee of Granada, assumed the duty of receiving for services rendered to the Arlington the highest possible price. But as trustee of Arlington it assumed the duty of trying to get these at the lowest possible price. An existing contract provided for payments of $960 per month. City National reduced those payments to $600 per month. Respondents attempt to justify this by *now saying* that the new price was fair. In *Jackson* v. *Smith*, 254 U. S. 586, 587 (1920), it

> "* * * affirmatively appears that the sale was fairly conducted; and that the property was finally knocked down to the highest bidder."

despite which this court held (p. 589) that even if the estate had not been injured, yet the fiduciary and others had acted improperly insofar as they had an adverse interest in the transaction. At pages 32-33 of their brief Respondents cite the Restatement of the Law of Trusts, Section 170-Q, for their contention that a trustee of one trust can sell to himself as trustee of another trust. No quotation from the section so cited is made. The following quotation shows that the rule is not as stated by Respondents. Section 170-Q of the Restatement of Trusts concludes:

> "If the circumstances are such that the interests of the beneficiaries of the different trusts are so conflicting that the trustee cannot deal fairly with respect to both trusts, he cannot act without applying to court for instructions."

No Disclosure Was Ever Made by Respondents.

It is not contended by Respondents that they ever applied to any court for instructions in this matter of reducing the contract payments to the Granada from the Arlington. Nor is it contended by Respondents that they ever made any *disclosure* to any of the Granada Bondholders or Creditors of the fact that they also acted as trustee of the Arlington and Lincoln Park Manor Hotel properties, which

were buying refrigeration and heating services from the Granada property of which the City National was also trustee. The brief here filed by Respondents carefully avoids any statement upon the duty of *disclosure and consent.* The Restatement of the Law of Trusts, at the section cited by Respondents does not purport to excuse this duty. Section 170 at page 431 states:

"DUTY OF LOYALTY.

"(1) *The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.*

"(2) *The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know.*"

This duty of disclosure was never performed. The Granada Bondholders and Creditors were not informed by anyone, that City National was receiving commissions as trustee of Arlington,—that a material adverse relationship existed,—that because of this relationship they could not expect undivided and complete loyalty from the City National Bank and Trust Company of Chicago, its committee or their attorneys. This legal duty of full disclosure is discussed at page 24 of petitioner's original brief. Respondents nowhere contend (1) that the law is different or (2) that such requirements of disclosure were satisfied by them.

At page 32 Respondents disparage the authorities cited by Petitioner. For the sake of the record it should be noted that the cases cited at page 25 of petitioner's brief did not deal solely with the principal-agency relationship, but that they deal also and precisely with trustee-cestui relationships. One of these cases was *Nonnast* v. *Northern Trust Company,* 374 Ill. 248, 29 N. E. (2d) 251 (1940), where the Supreme Court of Illinois rules that an executor serves in exactly the same fiduciary capacity as a trustee, and that when it acts in breach of its trust it is *not entitled*

to fees for itself or attorneys. Respondents cite no Illinois cases that are contrary to this holding. The case of *Edwards* v. *Lane*, 331 Ill. 442 (1928), is in full agreement with this petitioner's contentions.

At page 33 of their brief Respondents say:

> "* * * But it is interesting to note that in Volume 3, at page 1724, Mr. Bogert states 'A sale by T, as Trustee of the A estate, to T, as Trustee of the B estate, has been sanctioned where made in good faith.'"

This petitioner believes that it is even more interesting to note that the above quotation was immediately prefaced by Mr. Bogert's statement that "In *occasional* instances such sales, however, have been approved by the court." Needless to say, the addition of this full statement transforms Respondents' quotation into a remotely minority random case. More than that: Respondents ask Your Honors to "undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions."[31] The exception they suggest is, that after all, a fiduciary can serve two masters. That is not an exception. It is a broadside attack upon the fundamental law governing trustees.

(d) *Respondents' witnesses were correctly quoted and the proper meaning attributed to their testimony by Petitioner's original brief, and as such Respondents are not entitled to be compensated since they acted in breach of their trust duties to the detriment of the debtor estate.*

Pages 38 to 55 of Respondents' brief, attempt to show that this Petitioner misquoted the testimony of witnesses. This is a serious charge. Petitioner proposes to deal with that charge fully.

By way of introduction it may be said that Respondents' technique in attempting to prove their charge is (1) to quote from a different part of the record than that cited and quoted from by Petitioner; prefacing the new state-

31. Justice Cardoza in *Meinhard* v. *Salmon*, 249 N. Y. 458, 464; 164 N. E. 545.

ment with "what the witness really said was"—; (2) misquoting the record; (3) saying that the petitioner said or "implied" things which he did not say and did not imply and then attack the phantom implication with pretended anger; (4) saying exactly what the petitioner said in a slightly different way which in no manner changes the meaning of petitioner's statement regarding such testimony; (5) quoting from the "unprinted transcript" which Respondents know is not available so that Petitioner could check such quotations. These in sum and substance are the techniques used.

Because of the seriousness of Respondents' charges, this Petitioner at Appendix "A" deals with each objection made by Respondents from page 38 to page 55 of their brief.

In Answer to Respondents' Query at Page 56.

Whether or not all of the Respondents were "interested" in keeping the property in court cannot be stated. It can be stated, however, that they did keep it in court for a period of ten years. (See Appendix "A", page 93 of Petitioner's original brief.) Perhaps it was not, as Respondents urge, the City National or the Committee that did this. Respondents' discussion is limited to these two fiduciaries. This Petitioner suggests that it was probably the lawyers that kept the property in court for such a length of time. In computing their fees these lawyers used as their basis the number of hours spent and then multiplied that total by fifteen dollars.[34] If they had not spent 650.9[34] hours in the Pick furniture litigation, or 717.8[34] in defeating the jurisdiction of the Federal Court in the old bankruptcy proceedings, a total of some 1368 hours, they would not have been able to have claimed and partially receive the $20,520 that these hours multiplied by $15 total. Petitioner submits that this court has every reason to believe, and may well affirm the conclusion by the District Court, that the Re-

34. PR. 503.

spondent attorneys kept this property in court for the purpose of earning legal fees.

(e) *The breaches of trust disclosed in the failure of the committee to prosecute the Chicago Trust Company for its fraudulent prospectus and the part played in this trust violation by counsel and City National is sufficient reason why all parties Respondent should be denied fees.*

Respondents admit that if they had prosecuted the Chicago Trust Company for its fraudulent prospectus of 1924 and 1928, that Central Republic Trust Company would have had to pay for the fraud. At pages 58-59 of their brief Respondents state:

> "In 1931 Chicago Trust Company and Central Trust Company of Illinois consolidated under the state banking laws to form Central Republic Trust Company, *which by operation of law became liable for all and any liabilities of Chicago Trust Company.*"

We have already seen that Central Republic Trust Company and City National Bank and Trust Company were really one and the same thing.[35] We have also seen that the Granada Committee which was formed by City National had no independent status and was always dominated by City National Bank & Trust Company or its Central Republic adjunct who hired the lawyers for the Committee.[36] The City National as depositary for the Committee took the bonds from the bondholders and issued receipts for them. The Committee assumed to act for the bondholders in all matters pertaining to their legal rights under the Granada issues. The Committee did not attempt to hold Chicago Trust, or its successor obligor Central Republic, liable for the fraudulent statements of the 1924 and 1928 prospectus. Why not? The answer is plain. The Committee's attorneys were the attorneys for

35. PR. 195, page 36 of Petitioner's original brief; PR. 230-231, page 37 of petitioner's original brief; PR. 415 and discussion at pages 87-88 of Petitioner's original brief.

36. Testimony of Witness Johnson. PR. 436.

Central Republic. Central Republic and City National set up the Committee. Because of their adverse business connection, the Committee was stymied against starting legal proceedings even if the members had been so inclined. Respondents at pages 57 to 62 of their brief do not contend but that the Committee (which had legal title to the deposited bonds) had full power and authority to prosecute the Chicago Trust Company or its successors for this fraud. Respondents only state that the City National as indenture trustee had no authority. This breach of trust by the Committee was set forth at Chart One, Item 5, Page 64 of Petitioner's original belief.

At the top of page 59 of their brief, Respondents state that the Central Republic had, in 1932, pledged "all of its assets" to the Reconstruction Finance Corporation. There is no such evidence in the record and this statement is made without reference to the record. The Committee had been "functioning" for eighteen months before a receiver was appointed for Central Republic. The Committee could have obtained a pro rata share of Central Republic's assets, had it obtained a judgment, but suit was never commenced.

The claim could still have been made when Central Republic made its final account and City National upon Central's resignation was appointed trustee of Granada, but again, the claim was not asserted, but was released.[36-A]

At page 60 Respondents say that the cause of action was barred by the five year statute of limitations, which would have started running "September of 1928, the date of the sale of the bonds." In this they are again in error. It is a familiar rule of trust law that the Statute of Limitations does not begin to run until a disclosure of the breach has been made by the fiduciary. *State Bank & Trust Co. v. Commercial Trust & Savings Bank,* 300 Ill. App. 435, 21 N. E. (2d) 157. If the cause of action was

36A. PR. 114, 536 and unprinted transcript 1319 and 1322.

in fact barred by the five year statute of limitations it could only be because Respondents as agents of the bondholders had a knowledge of the fraud involved in the issuance of the prospectuses.

At page 62 Respondents suggest that the transaction at bar was approved by the Circuit Court of Appeals in the case of *Indemnity Insurance Company vs. Granada Apartments, Inc.,* 104 Fed. (2d) 528. This is not true. As respondents well know, although they were not parties to that suit, the court merely held that the indemnity company (I. I. C. N. A.) was not guilty of meddling in obtaining the receiver's certificate. Nothing in that case discusses the possible liability of the Respondents who are now before Your Honors.

At page 62 Respondents attempt to restate their assignments of error. The statement contained at pages 97 to 102 of petitioner's brief is accurate. Respondents have not questioned it. The statement at page 62 of Respondents' brief is inaccurate. Parts of findings 15, 20, 28, 37, 45 and 47 were assigned as error, but findings 14, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 31, 36, 44, 51 and 57 contain, as is shown at pages 97-102 of Petitioner's original brief, matter of a most material nature which was never assigned as error and which is sufficient reason why the trial court denied fees to Respondents.

(f) *The question of the amount of fees that should be paid a fiduciary is always a question of great importance to a court of general equity jurisdiction such as the United States Supreme Court.*

Petitioner does not retreat from his position that the Respondents are not entitled to *any* compensation. He will not discuss the relative fees that should have been allowed had the Respondents conducted themselves in accord with principles of good conscience and equity. Such a

discussion could proceed only from a false premise and be entirely hypothetical.

However, the Supreme Court of the United States, as a court of equity, is always interested in the question of the amount of fees allowed to a fiduciary. For this reason it would perhaps be helpful for the Court Trustee to present a statement on the matter.

The Respondents have asked for allowances totalling some $55,086.[37] Respondents' witnesses have testified that the debtor's property was worth $200,000 or $250,000.[38] Accordingly the claim of Respondents, if allowed, would amount to one-fourth or one-fifth of that valuation of the debtor property. Petitioner submits that such a charge could be justified only by the most unusual of circumstances and the utmost loyalty of the fiduciaries in the performance of beneficial services to the debtor. It is not shown that any of the services ever performed by the Respondents have been beneficial or have in any way increased the value of the debtor estate. Respondents do not so contend. It has been shown however, that the Respondents, in committing various breaches of trust, have performed a dis-service to the estate and its creditors and have lessened its value.

III.

The Circuit Court of Appeals Reversed the Uncontested Findings of the Trial Court.

Respondents contend at pages 63-64 of their brief that "the admitted facts do not show any breaches of trust or failure of fiduciary duty which warrants disallowance of Respondents' fees" and that in writing its opinion and deciding the case as it did "the Circuit Court of Appeals did not reverse any of the findings of the trial court which

37. Pages 763-764 of Printed Record.
38. PR. 220.

were not contested." At pages 97 to 102 of petitioner's original brief, he has listed and quoted, paragraph by paragraph, those parts of the findings of the trial court which were not assigned as error by the Respondents. That summary perfectly corresponds with Respondents' assignment of errors.[40] Also at pages 32-33, 42-43, 51-53 of Petitioner's original brief, some of the findings of the trial court which were not assigned as error are fully set forth.

It would serve no useful purpose to restate again these admitted findings. It is sufficient to state that they do relate to breaches of trust which were of such a serious nature as to justify a disallowance of the claims of the Respondents. The story is completely and carefully told in Appendix "D" of Petitioner's original brief. Respondents' Appendix "A" does not tell the story carefully or completely. The findings are not quoted, they are not numbered by paragraphs, they have no record references. It is impossible to tell which finding is which, or whether or not certain uncontested findings have been omitted. At first glance it appears, however, that the uncontested portion of finding 57 (PR. 790-791) is omitted from Respondents' summary at their Appendix "A". It is correctly quoted at page 102 of Petitioner's original brief.

The statements at pages 64-66 of Respondents' brief do not seem to deal with the matter under discussion, nor does the quotation from Petitioner's Circuit Court of Appeals brief (bottom of page 65-66) support the conclusion which Respondents would draw. The brief, as quoted does not charge "conspiracy".

Petitioner submits that the opinion of the Circuit Court of Appeals is directly contrary in all respects to those parts of the trial court's findings, which were not assigned as error. This proposition is fully discussed at pages 71-74 of Petitioner's original brief and at pages 46-49 of the Petition for Certiorari.

40. PR. 817-832.

IV.

The Circuit Court of Appeals Failed to Analyze Correctly the Evidence. Its Opinion Violates Rule 52 of the Rules of Civil Procedure.

Respondents' brief on its face shows, that the evidence on several points was conflicting. When Respondents' statement of the evidence is compared with Petitioner's quotation of the evidence, that conflict is even more apparent. At the very least it would seem (taking the case on the evidence alone and in disregard of the uncontested findings of the trial court) that the rule stated by Respondents at page 67 of their brief in relation to the cases of *In re Peacock Food Markets,* 108 Fed. (2d) 453 and *Savenger Service Corp.,* v. *Courtney,* 85 Fed. (2d) 825, would fully apply to the case at bar with identical results. Both of these cases were cited in this Petitioner's brief in the Circuit Court of Appeals. The *Peacock Food Markets Case* was analyzed at considerable length and fully compared with the case at bar at pages 75 to 81 of Petitioner's brief as filed in the Circuit Court of Appeals.

Petitioner does not deny that the Circuit Court of Appeals paid lip service to Rule 52 (page 68 Respondents' brief), but states that despite this the Court of Appeals did not substantially conform to or obey Rule 52 of the Rules of Civil Procedure. The failure is discussed rather fully, and correctly, at pages 15 to 35 of the Petition for Certiorari as filed in this court.

V.

The Court of Appeals Erred in Denying the Court Trustee's Motions to Dismiss.

This proposition is discussed at pages 50-51 of the petition for certiorari and at pages 76 to 80 of Petitioner's original brief.

Respondents' answering brief does not make it necessary to discuss at great length the issues herein involved. However, two matters should be clarified as follows:

(1) *Were two appeals necessary?* At page 70 of their brief Respondents state that two appeals were necessary because there were "other matters" at issue besides fees. This is not true so far as appeals 6986 and 7060 were concerned. Those cases dealt only with the compensation of the Respondents. They are identical to 281-282 which are now before Your Honors. There was no need for two appeals since each appeal was the same as the other.[41]

(2) *The extension of time on July 7, 1939.* This extension of time related only to appeal 7060; which was *the appeal by right.* That appeal, under the authority of *Dickinson Industrial Site* v. *Cowan,* 309 U. S. 382, was invalid. The only appeal pursuant to the *Dickinson Case* would be the one by leave, No. 6986. No timely or proper extension of time within which to file the record was ever obtained from the District Court in appeal 6986. This matter was called to Your Honors attention at the last sentence of paragraph one on page 80 of Petitioner's original brief. Respondents admit that this extension related only to 7060 (p. 71, their brief).

A complete discussion is to be found at PR. 1014-1023, which is the Petitioner's Motion to Dismiss and the suggestions in support of that motion.

VI.

The Circuit Court of Appeals Ruled That the United States District Court Was Without Power to Disallow Fees Mentioned By the Decree of the State Court.

For the reasons stated in his original brief at pages 81 to 87, this Petitioner is of the opinion that his criticism

41. The opinion of the Circuit Court of Appeals at PR. 956 States: "Appeals 6986 and 7060 are the same."

of the Circuit Court of Appeals in this regard is proper and that the correct conclusions were there drawn.

Respondents have never before admitted in their briefs in any court that their fees were not a matter of *res adjudicata* because of the state court decree. That admission now is made as an afterthought and with serious reservations, which are suggested at the last paragraph of their Point V, page 75.

In Conclusion.

The control by law, of those who manage or use the property of others, is a primary problem throughout the world, and in all history. In the ancient world those who had control or uses of property for others usually were slaves of others. These slaves had neither property nor civil rights. In the medieval world the control was exercised through the status of lord and retainer, who were bound together by sworn oath of fealty. After feudalism fell in England, the courts of equity gradually built up the fiduciary concept or relationship of trustee and beneficiary. The core of this relationship is fidelity to trust.

It seems that regardless of what form government takes, there must necessarily be a primary relation, protected by law, whereby property rights of minors, sick people, old people, people unfamiliar with the market place, may have their property cared for with undivided loyalty, under the ultimate supervision of courts and the government. In a democracy, such relationship usually arises in *pais* by agreement of the parties.

It is difficult to see how any government that recognizes private property can endure, unless some such relationship has the approval and constant support of the government. Any government which fails to maintain the ethical standards of that relationship, cannot keep the confidence of its citizenry. When the relationship of master and slave, or

lord and retainer, or trustee and beneficiary, or lawyer and client, is threatened with change, or is abused by either party thereto, a question of the utmost importance is presented regarding the continuance of the economic and social order.

That important question is now before Your Honors in the case at bar. Some of the laws enacted by the Congress during the last eight years have served to enforce the rules of good conscience relating to the fiduciary relationship. Laws such as the Securities and Exchange Act state the definite legislative policy of today. The Chandler Act is likewise built upon the concept of faithfulness of fiduciaries. It was to this end that courts of bankruptcy and of reorganization were given equitable jurisdiction. The trial court which heard the evidence in the case at bar was such a court. In the performance of its duty to enforce the rules relating to fiduciary conduct, it saw fit to deny to the Respondents now at bar certain claims for allowances. The pleadings and briefs by respondents, when read together, contain substantial admissions, which are sufficient to sustain the few findings by the District Court about which respondents now raise any question. As is shown at Charts One, Two and Three at pages 64 to 70 of Petitioner's original brief, there was ample evidence to support that decision. Much of the evidence thus presented to the trial court was preserved in certain findings of fact of the court which were not assigned as error. (See pages 97-102 of Petitioner's original brief.)

Petitioner submits that the reversal of the decree as entered in the District Court, by the opinion and orders of the Seventh Circuit Court of Appeals, presents a question of the continuance of a government dedicated to the protection of the ethical standards of the fiduciary relationship.

Prayer for Relief.

Wherefore, petitioner prays that those portions of the decree and findings of the District Court which were appealed from by the respondents, be affirmed, and that the decrees and opinion of the Circuit Court of Appeals be reversed, to the end that all fees and expenses be *denied* to City National Bank & Trust Company of Chicago, as former trustee, to the Granada Bondholders Committee, and to Defrees, Buckingham, Jones & Hoffman, as counsel for City National and as counsel for the Committee, that all costs in all courts be assessed against the respondents, that the cause be remanded to the District Court to determine, assess and enter judgment against the respondents for said costs, and for such relief as to this court may seem meet.

WEIGHTSTILL WOODS,
Attorney for Petitioner.

APPENDIX "A".

Respondents' witnesses were correctly quoted and the proper meaning attributed to their testimony by Petitioner's Original Brief. The objections stated by Respondents at pages 38 to 55 of their brief are "posed objections" carelessly made, and lacking in substance.[1]

(Page 38.)

(1) Sturm's statement as quoted by Petitioner is correct. Respondents' statement so shows. (Technique 4.)

(2) Sturm's statement as contained in Petitioner's brief is correct. Respondents' statement is only an attempt to assign reasons for the "cooperation". (Technique 4.)

(3) Sturm's statements in regard to creation of the committee, appointment of depositary and fees to members are again correctly stated. Respondents' statement is mere reiteration. (Technique 4.)

(Page 39.)

(4) Respondents do not question Petitioner's quotation from Sturm regarding the appointment of City National. They argue with the truth of Sturm's testimony by making their own unsupported assertion. (New technique.)

(5) Sturm's statement in regard to the committee's failure to object to lawyers' fees as quoted by petitioner, was at pages 229 and 214 of the printed record. Respondents state "Sturm said" and say they quote from a different part of the record at page 220. (Technique 1.)

(6) Sturm did not know what the property was worth, nor the tax situation from year to year. As stated at page

1. A discussion of the techniques utilized by respondents in their objections is to be found at pages 19-20, Point II (d) of this brief.

37 of petitioner's original brief, he didn't know within $50,000 of what it was worth. Respondents' quotation so admits. (Technique 4.)

(7) Respondents' statement does not materially change Sturm's statement that "I know it was represented in the circular that they bought the personal property when they bought the bonds, but they did not get it."[2] Despite the fact that Respondents prepared and abstracted the printed record, they indicate that it is inaccurate. (Techniques 4 and 5.)

(Page 40.)

(8) Respondents' quotation of Sturm from the unprinted transcript:

> "Q. Then it was paid for twice?
>
> "A. You can draw your own conclusions. I don't know."

proves the correctness of petitioner's statement that he didn't know if the furniture had been paid for twice. (Techniques 4 and 5.)

Sturm did not say that he thought the receiver's certificate was uncollectible so far as the Cody Trust *Officers* were concerned. His statement merely related to the Cody Trust Company itself—as an insolvent corporation. (Technique 2.)

(9) Petitioner can make no improvement upon the admission appearing at the top of page 41.

(Page 41.)

The petition as filed[3] by Charles S. Tuttle and the Committee was entitled "Petition for *Fees* and Expenses of the Committee for the Protection of the Holders of First Mortgage Bonds." (Technique 3.)

Sturm did not testify that the Granada stock went over to Mr. Albers as Receiver of Cody Trust Company. Re-

2. PR. 225.
3. PR. 156.

spondents refer to PR. 220 in support of their contention. The record at page 220 shows that they are mistaken. (Technique 2.)

(10) Mr. Sturm and the indemnity bond were discussed in Petitioner's brief with reference to page 229 of the printed record. At that page Sturm testified:

> "I understand that as a part of the settlement Mr. Wenstrand, Mr. Lewis W. Riddle and Mr. Hiram S. Cody, who were on that indemnity, Exhibit 'M', together with the Indemnity Insurance Company of North America, were released on their bonds of $40,000 in this court in case 8817, which was in default. I thought that it was proper to take the funds of this trust and pay off the obligations of those people on that bond in this court. I am not sure whether the matter was discussed at the bank before that payment was made. I believe I sat in on a discussion of it. I have a recollection of having discussed it, and I believe Mr. O'Brien[4] was present."

(Page 42.)

Respondents' discussion of another part of the record (PR. 225) is not in point. After failing to disclose this material on direct examination, Sturm reconsidered his answers on cross-examination and said that the whole matter had been discussed and that he knew of the indemnity arrangement. (Technique 1.)

(11) What O'Brien said (without qualifying it) was:[5]

> "Prior to the time that the Appellate Court rendered its decision I had numerous conferences with the parties in interest in an attempt to effect a settlement, those parties including Cody Trust Company, Central Republic Trust Company, Wenstrand, Hall, Granada Apartments, Inc., on the one side, and Klinger, Wilpartz & Hirsch and Schanfarber on behalf of Pick's assignee. At about that time Pick was seeking to recover on a suggestion of damages filed against the surety company on the appeal and injunction bonds in

4. Mr. Vincent O'Brien of Defrees, Buckingham, Jones & Hoffman (now Defrees, Buckingham, O'Brien & Fiske).

5. PR. 476.

the United States District Court proceeding above referred to. I believe that Wenstrand was really acting for Cody Trust Company in those proceedings. Hiram Cody and Lewis Riddle had given the surety company an indemnity agreement, but by 1933 Cody Trust Company was insolvent."

Respondent attorney thus testified. Respondents attempt to change the meaning of this testimony by quoting other portions of the record. (Technique 1.)

(Page 43.)

(12) Discussed in this brief at pages 3 and 36.

(13) Respondents' quotation of Arnold Johnson is partial and incomplete. He said[6] (speaking of the Reorganization Division of the City National Bank):

"* * * he would follow through from a reorganization standpoint *to make recommendations to the committee*[7] and put things in a concrete form *and to* make recommendations *as to a plan of action or* a plan of rec ganization. *I was in charge of those men.*"

Respondents' garbling of this testimony is neither helpful nor straight-forward. They have misused quotation marks in so doing. The correct quotation fully shows the extent that the Committee delegated its functions and duties to City National's "Reorganization Division".

Likewise when Respondents quote Johnson at page 431 of the printed record (and again they misuse the quotation marks) they omit, without indicating the omission, the following:

"The Reorganization Division was a division of the bank. All of the reorganization work with reference to the Granada was not conducted by that branch of the bank. Mr. Tuttle and Mr. Sturm are employed by the bank and are in its Reorganization Department."

(14) A perfect example of Technique 3. Petitioner

6. PR. 423.

7. Words depleted in Respondents' quotation are here italicized.

implied no such thing. How could one Committee book show the meetings of 400 Committees? Petitioner only said that "the Committee" held only four meetings.

(Page 44.)

(15) This contention of counsel is fully discussed at Point I of this brief at pages 4-5. As is there shown, witness Johnson was not speaking of the Thuma litigation (1930), but of the Harris-Tuttle matter (1935). (Techniques 1 and 2.)

(16) This is an example of technique 4, except that Respondents leave out Hubbart's statement that "$4,080 of accumulation for 1933 was not paid".

(Page 45.)

(17) Respondents' attempt by other witnesses to impeach the testimony of their own witness, Hubbart. Hubbart's testimony was:[8]

> "I did not make any effort to get any permanent tenant in that space."

(18) Respondents admit that it is true that Central Republic was trustee under both mortgages. (Technique 4.)

(19) Respondents do not deny Bickel's statement. They merely quote from a latter portion of the record. (Technique 1.)

(20) Respondents do not deny that witness McDonnell said he would "endeavor to make some use of the space to bring in some money,"[9] despite the restrictions stated. (Technique 1.)

(Page 46.)

(22) Respondents still do not explain the $4,080 charge-off. (Technique 1.)

(23) Respondents do not question the correctness of

8. PR. 176.
9. PR. 385.

Petitioner's quotation or following statement, but attempt to give new testimony on the subject. (Technique 1.)

(24) Petitioner's statement is again admitted with record references in aid thereof.

(Page 47.)

(25) O'Brien's statement as quoted by Petitioner is correct and the printed record prepared by him at the bottom of page 502 so shows. His present effort, without record references is an attempt at self-impeachment.

Paragraph 57 of the trial court's finding as quoted was not assigned as error. (See page 102 of Petitioner's original brief.)

(26) Respondents admit that "they were counsel for Central Republic Trust Company as Trustee under the Granada trust deed." (Technique 4.)

(Pages 47-48.)

(27) The statement at the second paragraph is without record reference or other supporting authority. The contrary facts may be assumed since Mr. O'Brien had himself testified[10] that

> "I think we were acting for the Chicago Trust Company as its general counsel."

Respondents do not refer to this admission. They desert the printed record which they themselves abstracted, printed and prepared, and quote from the unprinted transcript. (Technique 5.) The quotation, however, does not materially change the substance of the facts. (Technique 4.)

(Pages 49-50.)

At page 50, Respondents jump from page 1033 of the unprinted transcript to page 1036. This is for the purpose of omitting witness O'Brien's statement that $120,000 worth of furniture "depreciated" to $5,000.[11]

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10. PR. 497.
11. PR. 497, R. 1033.

(Page 51.)

O'Brien's testimony regarding his knowledge of the indemnity agreement is at page 476 of the printed record and is printed herein at pages 33-34.

(Pages 52-53.)

Respondents state that there is "a complete lack of any record evidence to show that attorney-respondents ever represented Cody Trust Company * * *." Respondents are mistaken. At page 978 of the printed record, it appears that the Cody Trust Company was represented by Defrees, Buckingham, Jones & Hoffman in some five cases before the Illinois Appellate Court. The citations of these five cases are: 266 Ill. App. 141; 269 Ill. App. 638; 272 Ill. App. 167; 293 Ill. App. 1; 294 Ill. App. 342. In view of this, Petitioner seriously questions the good faith of Respondents when they state that they never represented the Cody Trust Company.

(Page 54.)

Respondents admit that they have been unable to find in the record "any agreement or court order substituting City National Bank for Central Republic Trust Company" as depositary. (See page 89 of Petitioner's original brief.)

(Pages 54-55.)

Respondents do not deny that they were the attorneys for the Chicago Trust Company. They only deny that they were Cody's Attorneys. As we have seen above, Respondents also represented the Cody Trust Company.

(Page 55.)

Petitioner believes that Appendix "E" is entirely accurate. Respondents say that they deny parts of this Appendix. They do not say why or upon what basis the statements therein contained are inaccurate. They make no specifications which would permit of a rebuttal by this petitioner.